

**STATEMENT OF POSITION PRESENTED BY MR. DAVID MARREN
OF THE F.A. BARTLETT TREE EXPERT COMPANY ON BEHALF OF THE MEMBERSHIP OF THE
NATIONAL ARBORIST ASSOCIATION TO HOUSE SUBCOMMITTEE ON
NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS
FEBRUARY 15, 2000**

My Company, Bartlett Tree Expert Company is a member of National Arborist Association ("NAA").

NAA is the leading trade association in the Nation composed of employers in the tree care and arboriculture business. NAA has over 2,600 member companies, 50 of whom either reside or maintain offices and operations in Indiana, accounting for employment of an estimated 700 persons in Indiana and over 60,000 persons nationally.

NAA member companies have twice been the victims of OSHA's attempt to change its regulations by letters of interpretation as an end run around the required statutory processes. In each example, NAA was forced to threaten to sue OSHA, to protect members from such abuse, before OSHA, in each instance, revoked its improper letter of interpretation. Both instances are described below.

I. Attempt to Amend the OSHA "Logging Industry" Standard to Place the Tree Care Industry Within It

OSHA long has had a "logging industry" safety standard, 29 CFR 1910.266 (excerpt at Attachment 1-A). It always was applied to *logging*, never to arboriculture or tree trimming. Suddenly, OSHA issued a letter of interpretation, asserting out of whole cloth that the standard applied to tree care employers (OSHA's letter at Attachment 1-B). NAA wrote OSHA advising that its letter was unfounded and worse, illegal, for which NAA would sue, failing retraction (Attachment 1-C). In response, OSHA recanted (Attachment 1-D). Worse, while OSHA claims these letters of interpretation have no legal force, the fact of the matter is that they serve as the basis for prosecuting our members. For instance, North Carolina OSHA prosecuted one of our

NAA members under its own interpretive bulletin which expressly relied on the withdrawn federal OSHA logging letter of interpretation! (Attachment 1-E).

II. Attempt to Change Line Clearance Tree Trimming Standard's Aerial Lift Fall Protection Requirements Via Letter of Interpretation

The line clearance tree trimming part of the tree care industry protects electric service to the public from interruptions due to trees growing into power lines. NAA's members use aerial lift ("bucket") trucks and diligently use, at a minimum, the OSHA-required body belt and lanyard fall protection mechanism specifically prescribed by OSHA standard 1910.269(g)(2)(v) (Note 1) (which adopts body belt and lanyard requirement of 29 CFR 1910.67, excerpt at Attachment 2-A). Again, suddenly, OSHA issued a letter of interpretation that the body belt and lanyard requirement was being interpreted to now require, instead, use of a "full body harness and fall arrest lanyard" device *exclusively*. (Attachment 2-B). By thus suddenly changing the express body belt and lanyard requirement of the standard to a body harness requirement by fiat rather than by notice and comment, OSHA has prevented the sharing of views of tree industry safety professionals as to the pros and cons of making such a change in standard, which the notice and comment requirement was intended to achieve. Again NAA threatened to sue OSHA for this improper attempt to change the express wording of the standard without prior notice or opportunity for comment (Attachment 2-C), and again OSHA recanted (Attachment 2-D).

What is so disturbing about the use of these letters to change existing OSHA standards is that they evince an intentional pattern of changing standards by fiat without complying with the Notice and Comment provisions of the OSHA statute.

The Notice and Comment provisions of OSHA statute were erected there by Congress as a reflection of concern that OSHA is not the definitive word on safety; that, to the contrary, the best check on arbitrary imposition of wrong-headed regulation on small business is through the

opportunity, via Notice and Comment, to demonstrate to OSHA what makes sense, and what does not, so that the final regulation would be workable and acceptable.

To be sure, once a regulation issues, OSHA may issue a letter of interpretation explaining its meaning or to clarify its intent. We do not quarrel with such appropriate use of letters of interpretation.

The rub is not with clarification of properly adopted regulations. It is, instead, with misusing letters of interpretation to substantively change regulations without notice or opportunity to comment on the change in regulation. Stated more bluntly, our concern is that OSHA uses letters of interpretation as a high handed end-run around congressionally imposed procedures for changing standards, quickly backing off only when a group like National Arborist Association threatens to expose their illegal practice in court. But not every business has a watchdog like NAA to protect its interests. These are two instances. We can only imagine how many more regs get changed through the back door in this fashion in plain disregard of the Notice and Comment and judicial review procedures which Congress has imposed in the OSHA statute for the protection of small business.

One occasion of unlawful change of standard by letter of interpretation, followed by retraction when a court action is threatened, is an abuse which, if the Agency was unsophisticated, could be explained as a mistake. But twice doing so by a sophisticated Agency reflects intentional abuse to evade Congressionally imposed limitations on Agency action, which Congress must curb.

Ironically, while OSHA repeatedly ignores in this fashion the limitations which Congress placed on its authority to change safety regulations, the Agency hammers employers with fines of up to \$70,000 for its claim of the employer repeatedly violating OSHA regulations. Why is it

that Congress lets OSHA hammer small business for repeat violations, but looks the other way when OSHA repeatedly violates the restrictions which Congress placed on OSHA?

Indeed, OSHA's illegal attempt to change standards by letter of interpretation and then withdrawing same upon threat of court challenge is, we think, administered in bad faith: Even though OSHA officially withdrew its letter of interpretation over a year ago which attempted to place the tree care industry under the logging industry standard, that withdrawn letter of interpretation still was on OSHA's web site as recently as last week. – thereby announcing to its hoards of OSHA inspectors nationally the position to cite us under the logging standard. Thus, OSHA has perfected the art of a sham: It withdraws the illegally issued letter of interpretation in the face of threatened lawsuit – to disarm the lawsuit – but then duplicitously leaves the assertedly withdrawn letter on the OSHA web site for enforcement guidance anyway!

My Company, along with our industry represented by NAA, hopes this Committee immediately forces OSHA to comply with the law as diligently as OSHA would have us comply with its regulations.

At the same time, NAA is not insensitive to the fact that the opportunities for improving safety in the tree care industry are very much a moving target. We recognize the opportunities for improvement and are committed, through NAA's extensive involvement with the American National Standards Institute's Z-133.1 national consensus tree care safety standard, to work with industry, unions, and OSHA in a cooperative effort to improve safety on a consensus basis. The problem is not with our commitment to change to improve safety; it is with OSHA attempting to foist on us through the back door of letters of interpretation its notion, springing out of the head of one person who writes a letter, how the law effectively shall be changed, short circuiting the efforts of the ANSI national consensus committee and the methods imposed on OSHA by Congress for effectuating change.

SPECIAL INDUSTRIES

hangers to prevent saws from dropping on table.

(5) *Edgers*— (i) *Location*.

(a) Where vertical arbor edger saws are located ahead of the main saw, they shall be so guarded that an employee cannot contact any part of the edger saw from his normal position.

(b) Edgers shall not be located in the main roll case behind the head saws.

(ii) *Guards*.

(a) The top and the openings in end and side frames of edgers shall be adequately guarded and gears and chains shall be fully housed. Guards may be hinged or otherwise arranged to permit oiling and the removal of saws.

(b) All edgers shall be equipped with pressure feed rolls.

(c) Pressure feed rolls on edgers shall be guarded against accidental contact.

(iii) *Antikickback devices*.

(a) Edgers shall be provided with safety fingers or other approved methods of preventing kickbacks or guarding against them. A barricade in line with the edger, if properly fenced off, may be used if safety fingers are not feasible to install.

(b) A controlling device shall be installed and located so that the operator can stop the feed mechanism without releasing the tension of the pressure rolls.

(iv) *Operating speed of live rolls*. Live rolls and tailing devices in back of edger shall operate at a speed not less than the speed of the edger feed rolls.

(6) *Planers*— (i) *Guards*.

(a) All cutting heads shall be guarded.

(b) Side head hoods shall be of sufficient height to safeguard the head set-screw.

(c) Pressure feed rolls and "pincapples" shall be guarded.

(d) Levers or controls shall be so arranged or guarded as to reduce the possibility of accidental operation.

(f) *Dry kilns and facilities*.

(1) *Kiln foundations*. Dry kilns shall be constructed upon solid foundations to prevent tracks from sagging.

(2) *Passageways*. A passageway shall be provided to give adequate clearance on at least one side or in the center of end-piled kilns and on two sides of cross-piled kilns.

(3) *Doors*— (i) *Main kiln doors*.

(a) Main kiln doors shall be provided with a method of holding them open while kiln is being loaded.

(b) Counterweights on vertical lift doors shall be boxed or otherwise guarded.

(c) Adequate means shall be provided to firmly secure main doors, when they are disengaged from carriers and hangers, to prevent toppling.

(ii) *Escape doors*.

(a) If operating procedures require access to kilns, kilns shall be provided with escape doors that operate easily from the inside, swing in the direction of exit, and are located in or near the main door at the end of the passageway.

(b) Escape doors shall be of adequate height and width to accommodate an average size man.

(4) *Pits*. Pits shall be well ventilated, drained, and lighted, and shall be large enough to safely accommodate the kiln operator together with operating devices such as valves, dampers, damper rods, and traps.

(5) *Steam mains*. All high-pressure steam mains located in or adjacent to an operating pit shall be covered with heat-insulating material.

(6) *Ladders*. A fixed ladder, in accordance with the requirements of §1910.27 or other adequate means shall be provided to permit access to the roof. Where controls and machinery are mounted on the roof, a permanent stairway with standard handrail shall be installed in accordance with the requirements of §1910.24.

(7) *Chocks*. A means shall be provided for chocking or blocking cars.

(8) *Kiln tender room*. A warm room shall be provided for kiln employees to stay in during cold weather after leaving a hot kiln.

(9) [Removed]

[Removed at 63 FR 33467, June 18, 1998, effective Aug. 17, 1998]

(g) [Removed]

(h) [Removed]

(i) [Removed]

[(g) through (i) removed at 63 FR 33467, June 18, 1998, effective Aug. 17, 1998]

(j) [Removed]

[Removed at 61 FR 9241, March 7, 1996]

§1910.266 Logging operations.

[Revised at 59 FR 51741, Oct. 12, 1994; amended at 60 FR 47035, Sept. 8, 1995]

(a) *Table of contents*.

This paragraph contains the list of paragraphs and appendices contained in this section.

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(b) *Scope and application*.

(1) This standard establishes safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood. These types of logging include, but are not limited to, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products. This standard does not cover the construction or use of cable yarding systems.

(2) This standard applies to all logging operations as defined by this section.

(3) Hazards and working conditions not specifically addressed by this section are covered by other applicable sections of Part 1910.

(c) *Definitions applicable to this section*.

Arch. An open-framed trailer or built-up framework used to suspend the leading ends of trees or logs when they are skidded.

[Sec. 1910.266(c)]

Reply to the Attention of:



MAR 4 1998

Amelia Reinert
Deputy Executive Director
National Arborist Association, Inc.
Route 101
P.O. Box 1094
Amherst, NH 03031-1094

Dear Ms. Reinert,

I want to thank you meeting with me to discuss the Occupational Safety and Health Administration's (OSHA) Logging Operations Standard (29 CFR 1910.266). The questions you have raised about whether the standard applies to commercial tree trimming and care indicate that this issue needs to be clarified. As such, I will be sending this letter of interpretation to all our field offices. I apologize for any delay in responding to your questions.

There are many types of operations involved in logging. They include, but are not limited to, felling trees, cutting branches off trees and logs, cutting felled trees into logs, chipping branches, and moving felled trees and logs. The hazards that the Logging Operations Standard (29 CFR 1910.266) is intended to address are present in all of these operations. These hazards include the massive weights of tree branches and trees, especially the irresistible momentum of falling, moving or rolling trees and branches. The tools and equipment that employees use to perform these operations, such as chain saws, axes, and chippers, also pose hazards wherever they are utilized in industry. The hazards are even more acute when dangerous environmental conditions, such as severe rain, lightening, strong winds, snow, ice, extreme cold, rough terrain, and remote or isolated work sites, are factored in. "The combination of these hazards presents a significant risk to employees." 59 Federal Register 51672, 51673, Oct. 12, 1994 (Preamble to the final Logging Operations Standard).

The operations, tools, equipment, environmental conditions, and hazards described above are found in commercial tree trimming and cutting operations as well as tree harvesting operations. That is why the Logging Operations standard includes such a broad definition of the operations to which the standard applies:

This standard establishes safety practices, means, methods, and operations for all types of logging, regardless of the end use of the wood. 29 CFR 1910.266 (b)(1).

* * * * *

Logging operations. Operations associated with felling and moving trees and logs from the stump to the point of delivery, **such as, but not limited to**, marking, felling, bucking, limbing, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel from one site to another. 29 CFR 1910.266 (c).

OSHA believes this definition is broad enough to include commercial tree cutting and trimming, operations which OSHA did not expressly exempt from coverage of the Logging Operations Standard. OSHA exempted only two logging operations from coverage of the standard: construction of cable yarding systems and the use of cable yarding systems. 29 CFR 1910.266 (b)(1). Even there, OSHA has specified that tree cutting operations leading up to the use of the cable yarding system are covered by the standard because "the hazards for loggers felling trees exist regardless of how the trees or logs are moved about the work site." 59 Federal Register 51672, 51698. For the same reason, when OSHA decided not to include logging road construction operations in the final standard, the agency said that cutting of trees in preparation of construction activities nevertheless would still be covered by the standard. 59 Federal Register 51699. And OSHA applied the same rationale in including in the standard the cutting trees in preparation for agricultural activities. 59 Federal Register 51699. These examples provide further indication that OSHA's intention in promulgating the Logging Operations Standard was to address hazards associated with cutting trees, wherever those hazards are found, including commercial tree trimming and cutting operations.

In addition, specific provisions in the Logging Operations Standard directed to the particular circumstances of operations such as commercial tree trimming and cutting also show that the standard applies to these operations. For example, OSHA provides two exceptions to the leg protection requirements that are directed to operations such as commercial tree trimming as opposed to tree harvesting. 29 CFR 1910.266 (d)(1)(iv). First, OSHA does not require chain saw operators to wear leg protection if the operator is working from inside a bucket truck, a type of equipment that is not generally used in forest locations. Also, OSHA does not require climbers to wear leg protection while operating a chain saw in a tree if the employer demonstrates that a greater hazard is posed by wearing leg protection in the particular situation.

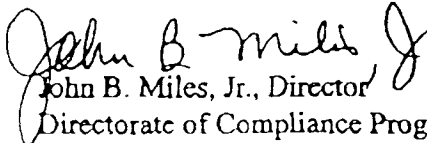
The provisions in the Logging Operations Standard addressing operations near overhead electric lines also are directed to operations such as commercial tree trimming, since it is generally very unlikely that power lines will be found in remote forest locations where tree harvesting operations are performed. 29 CFR 1910.266 (d)(8). Likewise, certain provisions regarding chain saw operation are specifically directed to operations such as commercial tree trimming. For example, the standard provides that chain saws may be started either on the ground or "where otherwise firmly supported." 29 CFR 1910.266 (c)(2)(vi). This alternative was included in the final standard in recognition of the fact that it would be a greater hazard to climb a tree to trim it with a running chain saw. 59 Federal Register 51712. Another example regarding chain saw operation is the exception OSHA provided to the requirement that the operator hold the chain saw with both hands while in use. 29 CFR 1910.266 (e)(2)(viii). In the preamble to the standard, OSHA explained:

OSHA believes there are other situations in which the hazard may be greater if the operator attempts to hold the saw with two hands. For example, when an operator has climbed a tree to top the tree, the operator may not be able to keep his balance if he tries to operate the saw with both hands. In that case, the safest method may be to use one hand to control the saw and the other hand to steady himself. 59 Federal Register 51713.

For all of these reasons, OSHA again states that the Logging Operations Standard applies to operations such as commercial tree trimming and cutting. OSHA believes that the equipment requirements, safe work practices and training provisions included in the Logging Operations Standard will significantly reduce the risks that workers, such as commercial tree trimmers, face and will reduce the injuries that occur as a result of exposure to the hazards associated with cutting and trimming trees.

Once again, we appreciate your time and interest in coming in to discuss these important workplace safety and health issues. If you have further questions regarding this matter, please feel free to contact me or Russelle McCollough on my staff at 202-219-8031.

Sincerely,


John B. Miles, Jr., Director
Directorate of Compliance Programs

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May 6, 1998

Mr. Charles N. Jeffress
Assistant Secretary of Labor
U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW
Washington, DC 20010

Re: National Arborist Association/Misapplication
of Logging Standard to Tree Care Work

Dear Assistant Secretary Jeffress:

We have been retained by National Arborist Association ("NAA") to commence an action against OSHA in the United States District Court for the District of Columbia, seeking a declaratory judgment and injunctive relief against OSHA's newly announced intention administratively to apply the 29 C.F.R. 1910.266 "logging industry" standard to the arborist industry. The gravamen of the intended court suit would be that OSHA's action violates the Administrative Procedure Act, 5 U.S.C. §553, *et seq.*, by announcing the application of such substantive rules upon arborists without prior notice and opportunity for comment required under the APA, and also by the Agency engaging in arbitrary and capricious action. NAA prefers, if possible, amicably to resolve this matter without litigation. We therefore propose a meeting with you and a member to the Solicitor's staff to explore whether resolution can be found. If OSHA is agreeable to such a meeting, we would delay filing suit pending such discussions.

By way of background, our research indicates that the current §1910.266 logging standard had its genesis in the predecessor 29 C.F.R. 1910.266 "pulpwood logging" standard. By notice of proposed rulemaking, 54 F.R. 18798, OSHA proposed to extend this standard from pulpwood logging only, to the entire logging industry; and thereby to expand its protections to all loggers in the Nation. This notice of proposed rule making contained no suggestion whatsoever of proposing to apply its terms to the tree care industry. This announced proposed limited focus to the logging industry only -- without any indication of

Mr. Charles N. Jeffress

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application to the tree care industry -- repeatedly was restated in OSHA's semi annual agenda of regulatory activity (commencing 48 F.R. 47538), citing such limited logging industry object (both by text description, as well as by SIC Code).

Apart from the very absence of fair notice of intended application to the arborist industry, and of consequent deprivation of statutory opportunity to comment on same in the proposed rulemaking process, other factors reinforce NAA's perception of unfair, arbitrary, treatment by OSHA: Thus, during the very period of pendency of promulgation of the §1910.266 logging standard, OSHA *simultaneously* was promulgating comprehensive standards for safety in the line clearance tree trimming industry under then-pending 29 C.F.R. 1910.269(a),(r). NAA was deeply involved in development of that standard (see extensive references to NAA's involvement in preamble to final rule, 59 F.R. 4320, *et seq.*), having fully participated in promulgation hearings in Washington, DC and Los Angeles, and having submitted numerous materials to that Record. Yet never throughout that promulgation was there any hint by OSHA of tree care work *also* being the object of contemplated coverage by a logging standard proposal.¹ In fact, any suggestion to the contrary would have been nonsensical inasmuch as safety standards then being developed for line clearance tree work under §1910.269 (foot protection, for instance) were being targeted to tree care and, indeed, were adopted different in substance from that being adopted for logging. And, respectfully, when Compliance Director John B. Miles met with NAA on July 21, 1997 to discuss industry concerns towards continuing to develop a positive relationship with the tree care industry in the interest of safety, he specifically assured NAA's representatives that OSHA intended *not* to apply the logging standard to tree care work and stated that a Program Directive shortly would issue to that effect. But then Compliance Director Miles issued a letter of March 4, 1998 to NAA, precisely to the *opposite* result. Indeed, not only did Mr. Miles' letter contradict his oral assurances (above) to NAA, but it also contradicted Mr. Miles' own field memorandum of March 12, 1996 that tree cutting for the purpose of electric utility line work was governed by §1910.269 and "is not covered by the Logging Standard".

Compliance Director Miles' letter to NAA states OSHA's intent to apply the logging standard to tree care stems from the Agency's interpretation of the meaning of the definition of "logging" in §1910.266 -- that, in effect, it arguably also "fits" tree care. To be sure, OSHA is free to determine enforcement policy and standards interpretations unencumbered by the APA's notice and comment procedures. However, an agency cannot, in the name of such interpretive license, thereby effectively swallow APA's notice and comment procedures altogether by extending a regulation to cover an industry which never had fair notice that *its* interests were the intended object of a proposed standard or fair opportunity to comment on

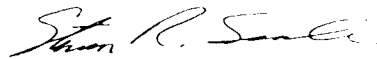
¹ Indeed, in contrast to the semi annual agenda announcements of limited groups affected by the logging standard's proposal, the tree care promulgation was, at the same time, announced more broadly to impact "multiple sectors". See e.g. 58 F.R. 56580.

Mr. Charles N. Jeffress
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same. See, e.g. National Mining Assn. v. Mine Safety and Health Administration, 116 F.3d 520, 530-531 (D.C. Cir. 1997, and cases cited therein); American Trucking Assns. v. Secy. of Labor, 955 F.Supp. 4 (D.D.C. 1997). Respectfully, this is not mere enforcement policy, it is an impermissible end-run around the APA at best, and an attempted sandbag of this industry at worst.

We look forward hearing from you or from counsel whether a meeting to attempt to resolve these issues amicably may be useful. We would appreciate hearing from you by May 26th regarding scheduling such a meeting, and would agree not to file suit pending such meeting. NAA prides itself in its long and constructive relationship with OSHA in the interests of employee safety. The Association therefore hopes that dysfunctional litigation in this matter can be avoided.

Sincerely,
SEMLER & PRITZKER



Steven R. Semler

SRS/sp

cc: John B. Miles, Jr., Director of Compliance
Joseph M. Woodward, Associate Solicitor
The Honorable Kay Bailey Hutchison, Member, United States Senate
The Honorable James M. Jeffords, Member, United States Senate
The Honorable Cass Ballenger, Member, United States Congress
Arthur Rosentfeld, Chief Counsel, Senate Labor and Human Resources Committee

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D C 20210



JUN 22 1998

Amelia Reinert
Deputy Executive Director
National Arborist Association, Inc.
Route 101
P.O. Box 1094
Amherst, New Hampshire 03031-1094

Dear Ms. Reinert:

The purpose of this letter is to withdraw the Occupational Safety and Health Administration's (OSHA) response dated March 4, 1998 (copy enclosed) to your correspondence of July 23, 1997, regarding compliance issues raised by the National Arborist Association.

We would like to consider these issues again, in dialogue with your organization, to ensure safety and health in the commercial tree care industry.

Sincerely,

Emzell Blanton, Jr.
Deputy Assistant Secretary

Enclosure

North Carolina Department of Labor
Division of Occupational Safety and Health
Raleigh, North Carolina

Field Information System
SN/OPN

Operational Procedure
Notice 88C

Subject: North Carolina Special Emphasis Program to Reduce the Number of Injuries and Death Associated with Tree Felling and Related Activity

A. Purpose.

This notice reestablishes a North Carolina Special Emphasis Program (SEP) to address the hazards associated with tree felling and related activity. This effort will include safety inspections and specific consultation and education and training activities.

B. Scope.

Tree felling activity includes limbing, bucking, marking, and cutting logs of trees to length as well as felling. Covered operations include but are not limited to logging, tree trimming, felling of trees in preparation for construction activity such as the building of roads or trails, preparation for agricultural activity, sawmilling, and storm debris cleanup and removal. Tree felling activity could reflect Standard Industrial Classification (SIC) Codes 0783, 1629, 2411, 2421, and those codes representing the public sector. This notice is applicable throughout North Carolina.

C. Action.

This Operational Procedure Notice (OPN) provides for special emphasis inspections in accordance with GS 95-136.1(2) due to a high rate of work related deaths.

D. Background.

North Carolina initiated the state's first special emphasis inspection program for tree felling operations in 1994 in response to an increasing number of fatalities and serious injuries associated with tree felling and related activity. Through consultation, education and training, and compliance activity, the SEP had a significant impact on reducing the number of fatalities relating to tree felling. In 1993, the state experienced 13 fatalities in tree felling operations, while the number dropped to only three deaths in 1994. The special emphasis program was not extended beyond 1995. The years 1996 and 1997 have seen the number of tree felling fatalities increase to a level near that of 1993. In 1996 there were 12 fatalities and 11 in 1997. In response to the increasing number of fatalities over the past two years, the tree felling special emphasis inspection program has been resumed. This SEP will address tree felling and include activity associated with continuing storm cleanup projects. Funds are now being made available to cities, towns, and counties to address secondary cleanup sites not previously scheduled for cleanup. Part of the SEP educational process will be to make public sector instrumentalities aware that subcontractors hired for storm cleanup involving tree felling and related activity are

covered under applicable OSHA standards, including Logging Operations.

E. Expiration.

This SEP shall remain in effect until canceled by the Director.

F. Training and Consultative Activity.

The Bureau of Training and Outreach, and Consultative Services shall provide training and consultative efforts to address the hazards associated with tree felling and related activity.

G. Inspection Activity.

Each District Office shall conduct inspections under this state special emphasis program.

1. Scheduling.

- a. The Division shall develop a list of establishments (worksites) likely to be covered by this special emphasis program. Inspection sites can be randomly selected for inspection from this list using a random numbers table. As new sites are added, they should be randomized for inspection. SIC codes most likely to be included in this list are 0783, 1629, 2411, 2421, and those codes representing the public sector.
- b. The randomly selected establishments designated for inspection under this special emphasis program will be included with the usual assignment list distributed to each Safety District Supervisor on a periodic basis.

2. Referrals.

- a. In response to the high visibility and mobile nature of tree felling operations, any serious hazards observed shall normally be investigated immediately by the Safety Compliance Officer (SCO) who observes them after consulting with the District Supervisor as Compliance Bureau procedures require. Serious safety hazards observed by the Health Compliance Officer (HCO) shall be referred to the Bureau of Safety Compliance.
- b. Because many tree felling operations are located in remote locations where the observation of hazards from public areas would not be possible, whenever a SCO observes or receives information regarding a site where tree felling may be taking place but no violation is observed, the SCO and the District Supervisor shall determine if the site needs to be immediately scheduled for inspection or added to the list of establishments to be randomly selected for inspection. Such determination shall be based on but not limited to the following criteria: the resources available for inspecting the site, the size of the operation, the prior history of the operator if known, and/or the likelihood that the site will be abandoned before it could be randomly selected for inspection.

- c. For tree felling operations associated with storm cleanup, the Bureau Chief of Safety Compliance may request that specific searches be conducted to locate the cleanup sites. This would include contact with public sector instrumentalities.

3. IMIS Coding.

The OSHA-1 form for all inspections conducted as a result of this special emphasis program shall be coded as local emphasis program inspections in block 25C and marked "TREE FELLING."

H. Applicability of 1910.266 Logging Operations

- 1. All activities under this OPN shall be considered covered under standards for Logging Operations 1910.266. This clarification is provided to give those employees and employers subject to the OPN, as well as the SCOs conducting inspections, clear guidance on which rules the Division will apply to the various working conditions addressed by the OPN through the special emphasis inspection program.

- 2. OSHA standard 1910.266 applies to employers and employees using all types of tree cutting and logging equipment or techniques. Employers engaged in storm reconstruction work, debris removal, site clearing in preparation for construction work, and other covered operations are expected to adhere to the "vertical" Logging Operations standard. In addition, the standard, and a subsequent interpretative memo from Federal OSHA dated March 4, 1998, also specify that the requirements apply "regardless of the end use of the wood".

I. Evaluation of Program.

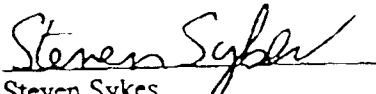
1. Bureau Chiefs' Responsibilities.

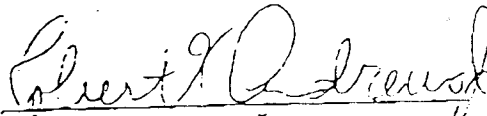
Bureau Chiefs affected by this special emphasis program shall submit to the Director by June 30, 1999, an evaluation report to include at least the following:

a. Bureau Chief of Safety Compliance:

- (1) Number of inspections.
- (2) Number of citations and violations issued.
- (3) Impact on the number of fatalities in tree felling activities.
- (4) Standards cited.
- (5) Scheduling problems, such as locating work sites or establishments for this special emphasis program.
- (6) Number of safety and health programs improved or implemented.
- (7) Overall assessment of this special emphasis program including the impact on other Bureau activities, and the goal of eliminating hazards associated with tree felling.
- (8) Standard promulgation recommendations.

- b. Bureau Chief of Consultative Services:
- (1) Description of outreach efforts implemented.
 - (2) Assessment of the impact of outreach efforts.
 - (3) Number of employers and employees affected.
 - (4) Number of consultative visits conducted.
 - (5) Types of hazards observed.
 - (6) Number of safety and health programs improved or implemented.
 - (7) Standard promulgation recommendations.
- c. Bureau Chief of Training and Outreach:
- (1) Description of outreach efforts implemented.
 - (2) Assessment of the impact of outreach efforts.
 - (3) Number of training sessions conducted.
 - (4) Number of employers and employees affected.
 - (5) Standard promulgation recommendations.
 - (6) Number of safety and health programs improved or implemented.


Steven Sykes
State Plan Coordinator


Robert K. Andrews, Jr.
Director

6/4/98
Date

demonstrated his ability to perform his duties safely at his level of training.

(36) *System operator/owner.* The person or organization that operates or controls the electrical conductors involved.

(37) *Telecommunications center.* An installation of communication equipment under the exclusive control of an organization providing telecommunications service, that is located outdoors or in a vault, chamber, or a building space used primarily for such installations.

Note. Telecommunication centers are facilities established, equipped and arranged in accordance with engineered plans for the purpose of providing telecommunications service. They may be located on premises owned or leased by the organization providing telecommunication service, or on the premises owned or leased by others. This definition includes switch rooms (whether electromechanical, electronic or computer controlled), terminal rooms, power rooms, repeater rooms, transmitter and receiver rooms, switchboard operating rooms, cable vaults, and miscellaneous communications equipment rooms. Simulation rooms of telecommunication centers for training or developmental purposes are also included.

(38) *Telecommunications derricks.* Rotating or nonrotating derrick structures permanently mounted on vehicles for the purpose of lifting, lowering, or positioning hardware and materials used in telecommunications work.

(39) *Telecommunication line truck.* A truck used to transport men, tools, and material, and to serve as a traveling workshop for telecommunication installation and maintenance work. It is sometimes equipped with a boom and auxiliary equipment for setting poles, digging holes, and elevating material or men.

(40) *Telecommunication service.* The furnishing of a capability to signal or communicate at a distance by means such as telephone, telegraph, police and fire-alarm, community antenna television, or similar system, using wire, conventional cable, coaxial cable, wave guides, microwave transmission, or other similar means.

(41) *Unvented vault.* An enclosed vault in which the only openings are access openings.

(42) *Vault.* An enclosure above or below ground which personnel may enter, and which is used for the purpose of installing, operating, and/or maintaining equipment and/or cable which need not be of submersible design.

(43) *Vented vault.* An enclosure as described in paragraph (s) (42) of this section, with provision for air changes using exhaust flue stack(s) and low level air intake(s), operating on differentials of pres-

sure and temperature providing for air flow.

(44) *Voltage of an effectively grounded circuit.* The voltage between any conductor and ground unless otherwise indicated.

(45) *Voltage of a circuit not effectively grounded.* The voltage between any two conductors. If one circuit is directly connected to and supplied from another circuit of higher voltage (as in the case of an autotransformer), both are considered as of the higher voltage, unless the circuit of lower voltage is effectively grounded, in which case its voltage is not determined by the circuit of higher voltage. Direct connection implies electric connection as distinguished from connection merely through electromagnetic or electrostatic induction.

§1910.269 Electric power generation, transmission, and distribution.

[1910.269 added by 59 FR 4437, January 31, 1994; corrected by 59 FR 33660, 33662, June 30, 1994]

Note: OSHA is staying the enforcement of the following paragraphs of §1910.269 until November 1, 1994: (b)(1)(ii), (d) except for (d)(2)(i) and (d)(2)(iii), (e)(2), (e)(3), (j)(2)(iii), (l)(2)(iii), (m), (n)(3), (n)(4)(ii), (n)(8), (o) except for (o)(2)(i), (r)(1)(vi), (u)(1), (u)(4), and (v). OSHA is also staying the enforcement of paragraphs (n)(6) and (n)(7) of §1910.269 until November 1, 1994, but only insofar as they apply to lines and equipment operated at 600 volts or less. Further, OSHA is staying the enforcement of paragraph (s)(1)(ii) of §1910.269 until February 1, 1996.

[1910.269 Stay note added by 59 FR 33660, June 30, 1994]

(a) General.

(1) Application.

(i) This section covers the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment. These provisions apply to:

(A) Power generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering, which are accessible only to qualified employees.

Note: The types of installations covered by this paragraph include the generation, transmission, and distribution installations of electric utilities, as well as equivalent installations of industrial establishments. Supplementary electric generating equipment that is used to supply a workplace for emergency, standby, or similar purposes only is covered under Subpart S of this Part. (See paragraph (a)(1)(ii)(B) of this section).

(B) Other installations at an electric power generating station, as follows:

(1) Fuel and ash handling and processing installations, such as coal conveyors,

(2) Water and steam installations, such as penstocks, pipelines, and tanks, providing a source of energy for electric generators, and

(3) Chlorine and hydrogen systems;

[1910.269(a)(1)(i)(B)(3) corrected by 59 FR 33662, June 30, 1994]

(C) Test sites where electrical testing involving temporary measurements associated with electric power generation, transmission, and distribution is performed in laboratories, in the field, in substations, and on lines, as opposed to metering, relaying, and routine line work.

[1910.269(a)(1)(i)(C) corrected by 59 FR 33662, June 30, 1994]

(D) Work on or directly associated with the installations covered in paragraphs (a)(1)(i)(A) through (a)(1)(i)(C) of this section, and

[1910.269(a)(1)(i)(D) corrected by 59 FR 33662, June 30, 1994]

(E) Line-clearance tree-trimming operations, as follows:

(1) Entire §1910.269 of this Part, except paragraph (r)(1) of this section, applies to line-clearance tree-trimming operations performed by qualified employees (those who are knowledgeable in the construction and operation of electric power generation, transmission, or distribution equipment involved, along with the associated hazards).

(2) Paragraphs (a)(2), (b), (c), (p), (k), (p), and (r) of this section apply to line-clearance tree-trimming operations performed by line-clearance tree trimmers who are not qualified employees.

(ii) Notwithstanding paragraph (a)(1)(i) of this section, §1910.269 of this Part does not apply:

[1910.269(a)(1)(ii) introductory text corrected by 59 FR 33662, June 30, 1994]

(A) To construction work, as defined in §1910.12 of this Part, or

(B) To electrical installations, electrical safety-related work practices, or electrical maintenance considerations covered by Subpart S of this Part.

Note 1: Work practices conforming to §§1910.332 through 1910.335 of this Part are considered as complying with the electrical safety-related work practice requirements of this section identified in Table 1 of Appendix A-2 to this section, provided the work is being performed on a generation or distribution installation meeting §§1910.303 through 1910.308 of this Part. This table also identifies provisions in this section that apply to work by qualified persons directly on or associated with installations of electric power generation, transmission, and distribution.

[Sec. 1910.269(a)(1)(ii)(B)]

and for rescue of employees from such spaces.

[Editor's note: 1910.269(c)(2) and (3) are stayed temporarily. See Note at beginning of this section.]

(2) *Training.* Employees who enter enclosed spaces or who serve as attendants shall be trained in the hazards of enclosed space entry, in enclosed space entry procedures, and in enclosed space rescue procedures.

(3) *Rescue equipment.* Employers shall provide equipment to ensure the prompt and safe rescue of employees from the enclosed space.

(4) *Evaluation of potential hazards.* Before any entrance cover to an enclosed space is removed, the employer shall determine whether it is safe to do so by checking for the presence of any atmospheric pressure or temperature differences and by evaluating whether there might be a hazardous atmosphere in the space. Any conditions making it unsafe to remove the cover shall be eliminated before the cover is removed.

Note: The evaluation called for in this paragraph may take the form of a check of the conditions expected to be in the enclosed space. For example, the cover could be checked to see if it is fastened and if it is fastened in place, could be loosened gradually to release any residual pressure. A determination must also be made of whether conditions at the site could cause a hazardous atmosphere, such as an oxygen deficient or flammable atmosphere, to develop within the space.

(5) *Removal of covers.* When covers are removed from enclosed spaces, the opening shall be promptly guarded by a railing, temporary cover, or other barrier intended to prevent an accidental fall through the opening and to protect employees working in the space from objects entering the space.

(6) *Hazardous atmosphere.* Employees may not enter any enclosed space while it contains a hazardous atmosphere unless the entry conforms to the general permit required confined spaces standard in §1910.146 of this Part.

Note: The term "entry" is defined in §1910.146(b) of this Part.

(7) *Attendants.* While work is being performed in the enclosed space, a person with first aid training meeting paragraph (b) of this section shall be immediately available outside the enclosed space to render emergency assistance if there is reason to believe that a hazard may exist in the space or if a hazard exists because of traffic patterns in the area of the opening used for entry. That person is not pre-

cluded from performing other duties outside the enclosed space if these duties do not distract the attendant from monitoring employees within the space.

Note: See paragraph (t)(3) of this section for additional requirements on attendants for work in manholes.

[1910.269(c)(7) Note corrected by 59 FR 33662, June 30, 1994]

(8) *Calibration of test instruments.* Test instruments used to monitor atmospheres in enclosed spaces shall be kept in calibration, with a minimum accuracy of ± 10 percent.

(9) *Testing for oxygen deficiency.* Before an employee enters an enclosed space, the internal atmosphere shall be tested for oxygen deficiency with a direct-reading meter or similar instrument, capable of collection and immediate analysis of data samples without the need for off-site evaluation. If continuous forced air ventilation is provided, testing is not required provided that the procedures used ensure that employees are not exposed to the hazards posed by oxygen deficiency.

(10) *Testing for flammable gases and vapors.* Before an employee enters an enclosed space, the internal atmosphere shall be tested for flammable gases and vapors with a direct-reading meter or similar instrument capable of collection and immediate analysis of data samples without the need for off-site evaluation. This test shall be performed after the oxygen testing and ventilation required by paragraph (e)(9) of this section demonstrate that there is sufficient oxygen to ensure the accuracy of the test for flammability.

(11) *Ventilation and monitoring.* If flammable gases or vapors are detected or if an oxygen deficiency is found, forced air ventilation shall be used to maintain oxygen at a safe level and to prevent a hazardous concentration of flammable gases and vapors from accumulating. A continuous monitoring program to ensure that no increase in flammable gas or vapor concentration occurs may be followed in lieu of ventilation, if flammable gases or vapors are detected at safe levels.

Note: See the definition of hazardous atmosphere for guidance in determining whether or not a given concentration of a substance is considered to be hazardous.

[1910.269(c)(11) Note corrected by 59 FR 33662, June 30, 1994]

(12) *Specific ventilation requirements.* If continuous forced air ventilation is used, it shall begin before entry is made and shall be maintained long enough to ensure that a safe atmosphere exists

before employees are allowed to enter the work area. The forced air ventilation shall be so directed as to ventilate the immediate area where employees are present within the enclosed space and shall continue until all employees leave the enclosed space.

(13) *Air supply.* The air supply for the continuous forced air ventilation shall be from a clean source and may not increase the hazards in the enclosed space.

(14) *Open flames.* If open flames are used in enclosed spaces, a test for flammable gases and vapors shall be made immediately before the open flame device is used and at least once per hour while the device is used in the space. Testing shall be conducted more frequently if conditions present in the enclosed space indicate that once per hour is insufficient to detect hazardous accumulations of flammable gases or vapors.

Note: See the definition of hazardous atmosphere for guidance in determining whether or not a given concentration of a substance is considered to be hazardous.

[1910.269(c)(14) Note corrected by 59 FR 33662, June 30, 1994]

(t) *Excavations.* Excavation operations shall comply with Subpart P of Part 1926 of this chapter.

(u) *Personal protective equipment.*

(i) *General.* Personal protective equipment shall meet the requirements of Subpart E of this Part.

(ii) *Fall protection.*

(A) Personal fall arrest equipment shall meet the requirements of Subpart M of Part 1926 of this Chapter.

[1910.269(g)(1)(ii) revised by 59 FR 40729, August 9, 1994]

(B) Body belts and safety straps for work positioning shall meet the requirements of §1926.559 of this Chapter.

(iii) Body belts, safety straps, lanyards, lifelines, and body harnesses shall be inspected before use each day to determine that the equipment is in safe working condition. Defective equipment may not be used.

(iv) Lifelines shall be protected against being cut or abraded.

(v) All fall arrest equipment, work positioning equipment, or travel restricting equipment used by employees working at elevated locations more than 4 feet (1.2 m) above the ground on poles, towers, or similar structures if other fall protection has not been provided. Fall protection equipment is not required to be used by a qualified employee climbing or changing location on poles, towers, or similar structures, unless conditions, such as, but not limited to, ice, high winds, the design of the structure (for example, no

[Sec. 1910.269(g)(2)(v)]

provision for holding on with hands), or the presence of contaminants on the structure, could cause the employee to lose his or her grip or footing.

[1910.269(g)(2)(v) corrected by 59 FR 33662, June 30, 1994]

Note 1: This paragraph applies to structures that support overhead electric power generation, transmission, and distribution lines and equipment. It does not apply to portions of buildings, such as loading docks, to electric equipment, such as transformers and capacitors, nor to aerial lifts. Requirements for fall protection associated with walking and working surfaces are contained in Subpart D of this Part. Requirements for fall protection associated with aerial lifts are contained in §1910.67 of this Part. →

Note 2: Employees undergoing training are not considered "qualified employees" for the purposes of this provision. Unqualified employees (including trainees) are required to use fall protection any time they are more than 4 feet (1.2 m) above the ground.

(vi) The following requirements apply to personal fall arrest systems:

(A) When stopping or arresting a fall, personal fall arrest systems shall limit the maximum arresting force on an employee to 900 pounds (4 kN) if used with a body belt.

(B) When stopping or arresting a fall, personal fall arrest systems shall limit the maximum arresting force on an employee to 1800 pounds (8 kN) if used with a body harness.

(C) Personal fall arrest systems shall be rigged such that an employee can neither free fall more than 6 feet (1.8 m) nor contact any lower level.

(vii) If vertical lifelines or droplines are used, not more than one employee may be attached to any one lifeline.

(viii) Snaphooks may not be connected to loops made in webbing-type lanyards.

(ix) Snaphooks may not be connected to each other.

(h) *Ladders, platforms, step bolts, and manhole steps.*

(1) *General.* Requirements for ladders contained in Subpart D of this Part apply, except as specifically noted in paragraph (ii)(2) of this section.

(2) *Special ladders and platforms.* Portable ladders and platforms used on structures or conductors in conjunction with overhead line work need not meet paragraphs (d)(2)(i) and (d)(2)(iii) of §1910.25 of this Part or paragraph (c)(3)(iii) of §1910.26 of this Part. However, these ladders and platforms shall meet the following requirements:

(i) Ladders and platforms shall be secured to prevent their becoming accidentally dislodged.

(ii) Ladders and platforms may not be loaded in excess of the working loads for which they are designed.

(iii) Ladders and platforms may be used only in applications for which they were designed.

(iv) In the configurations in which they are used, ladders and platforms shall be capable of supporting without failure at least 2.5 times the maximum intended load.

(3) *Conductive ladders.* Portable metal ladders and other portable conductive ladders may not be used near exposed energized lines or equipment. However, in specialized high-voltage work, conductive ladders shall be used where the employer can demonstrate that nonconductive ladders would present a greater hazard than conductive ladders.

(i) *Hand and portable power tools.*

(1) *General.* Paragraph (i)(2) of this section applies to electric equipment connected by cord and plug. Paragraph (i)(3) of this section applies to portable and vehicle-mounted generators used to supply cord- and plug-connected equipment. Paragraph (i)(4) of this section applies to hydraulic and pneumatic tools.

(2) *Cord- and plug-connected equipment.* (1) Cord- and plug-connected equipment supplied by premises wiring is covered by Subpart S of this Part.

(ii) Any cord- and plug-connected equipment supplied by other than premises wiring shall comply with one of the following in lieu of §1910.243(a)(5) of this Part.

(A) It shall be equipped with a cord containing an equipment grounding conductor connected to the tool frame and to a means for grounding the other end (however, this option may not be used where the introduction of the ground into the work environment increases the hazard to an employee); or

(B) It shall be of the double-insulated type conforming to Subpart S of this Part; or

(C) It shall be connected to the power supply through an isolating transformer with an ungrounded secondary.

(3) *Portable and vehicle-mounted generators.* Portable and vehicle-mounted generators used to supply cord- and plug-connected equipment shall meet the following requirements.

(i) The generator may only supply equipment located on the generator or the vehicle and cord- and plug-connected equipment through receptacles mounted on the generator or the vehicle.

(ii) The non-current-carrying metal parts of equipment and the equipment grounding conductor terminals of the receptacles shall be bonded to the generator frame.

(iii) In the case of vehicle-mounted generators, the frame of the generator shall be bonded to the vehicle frame.

(iv) Any neutral conductor shall be bonded to the generator frame.

(4) *Hydraulic and pneumatic tools.*

(i) Safe operating pressures for hydraulic and pneumatic tools, hoses, valves, pipes, filters, and fittings may not be exceeded.

Note: If any hazardous defects are present, no operating pressure would be safe, and the hydraulic or pneumatic equipment involved may not be used. In the absence of defects, the maximum rated operating pressure is the maximum safe pressure.

(ii) A hydraulic or pneumatic tool used where it may contact exposed live parts shall be designed and maintained for such use.

(iii) The hydraulic system supplying a hydraulic tool used where it may contact exposed live parts shall provide protection against loss of insulating value for the voltage involved due to the formation of a partial vacuum in the hydraulic line.

Note: Hydraulic lines without check valves having a separation of more than 35 feet (10.7 m) between the oil reservoir and the upper end of the hydraulic system promote the formation of a partial vacuum.

(iv) A pneumatic tool used on energized electric lines or equipment or used where it may contact exposed live parts shall provide protection against the accumulation of moisture in the air supply.

[1910.269(i)(4)(iv) corrected by 59 FR 33662, June 30, 1994]

(v) Pressure shall be released before connections are broken, unless quick-acting, self-closing connectors are used. Hoses may not be kinked.

(vi) Employees may not use any part of their bodies to locate or attempt to stop a hydraulic leak.

(j) *Live-line tools.*

(1) *Design of tools.* Live-line tool poles, tubes, and poles shall be designed and constructed to withstand the following minimum tests:

(i) 100,000 volts per foot (3281 volts per centimeter) of length for 5 minutes if the tool is made of fiberglass-reinforced plastic (FRP), or

(ii) 75,000 volts per foot (2461 volts per centimeter) of length for 3 minutes if the tool is made of wood, or

[Sec. 1910.269(j)(1)(ii)]

(a) Designated personnel continuously available while the powered platform is in use; and

(b) Designated personnel on roof-powered platforms, undertaking emergency operation of the working platform by means of the emergency operating device located near the hoisting machine.

(iv) The emergency communication equipment shall be one of the following types:

(a) Telephone connected to the central telephone exchange system; or

(b) Telephones on a limited system or an approved two-way radio system, provided designated personnel are available to receive a message during the time the powered platform is in use.

(d) *Type T powered platforms* (1) *Roof car*. The requirements of paragraphs (c)(1) through (c)(5) of this Appendix shall apply to Type T powered platforms.

(2) *Working platform*. The requirements of paragraphs (c)(6) through (c)(16) of this Appendix apply to Type T powered platforms.

(i) The working platform shall be suspended by at least two wire ropes.

(ii) The maximum rated speed at which the working platform of self-powered platforms may be moved in a vertical direction shall not exceed 35 feet per minute.

(3) *Hoisting equipment*. The requirements of paragraphs (c)(17) and (18) of this Appendix shall apply to Type T powered platforms.

(4) *Brakes*. Brakes requirements of paragraph (c) (19) of this Appendix shall apply.

(5) *Hoisting ropes and rope connections*. (i) Paragraphs (c)(20)(i) through (iv) and (viii) of this Appendix shall apply to Type T powered platforms.

(ii) Adjustable shackle rods in subparagraph (c)(20)(vii) of this Appendix shall apply to Type T powered platforms, if the working platform is suspended by more than two wire ropes.

(6) *Electrical wiring and equipment*. (i) The requirements of paragraphs (c)(22) (i) through (vi) of this Appendix shall apply to Type T powered platforms. "Circuit protection limitation," "powered platform electrical service system," all operating services and control equipment shall comply with the specifications contained in Part 2, section 26, ANSI A120.1-1970.

(ii) For electrical protective devices the requirements of paragraphs (c)(22) (i) through (viii) of this Appendix shall apply to Type T powered platforms. Requirements for the "circuit potential limitation" shall be in accordance with specifications contained in Part 2, section 26, of ANSI A120.1-1970.

(7) *Emergency communications*. All the requirements of paragraph (c)(23) of this

Appendix shall apply to Type T powered platforms.

[1910.66 OMB control number removed by 61 FR 5508, Feb. 13, 1996]

§1910.67 Vehicle-mounted elevating and rotating work platforms.

(a) *Definitions applicable to this section*—(1) *Aerial device*. Any vehicle-mounted device, telescoping or articulating, or both, which is used to position personnel.

(2) *Aerial ladder*. An aerial device consisting of a single- or multiple-section extensible ladder.

(3) *Articulating boom platform*. An aerial device with two or more hinged boom sections.

(4) *Extensible boom platform*. An aerial device (except ladders) with a telescopic or extensible boom. Telescopic derricks with personnel platform attachments shall be considered to be extensible boom platforms when used with a personnel platform.

(5) *Insulated aerial device*. An aerial device designed for work on energized lines and apparatus.

(6) *Mobile unit*. A combination of an aerial device, its vehicle, and related equipment.

(7) *Platform*. Any personnel-carrying device (basket or bucket) which is a component of an aerial device.

(8) *Vehicle*. Any carrier that is not manually propelled.

(9) *Vertical tower*. An aerial device designed to elevate a platform in a substantially vertical axis.

(b) *General requirements*. (1) Unless otherwise provided in this section, aerial devices (aerial lifts) acquired on or after July 1, 1975, shall be designed and constructed in conformance with the applicable requirements of the American National Standard for "Vehicle Mounted Elevating and Rotating Work Platforms," ANSI A92.2-1969, including appendix, which is incorporated by reference as specified in §1910.6. Aerial lifts acquired for use before July 1, 1975 which do not meet the requirements of ANSI A92.2-1969, may not be used after July 1, 1976, unless they shall have been modified so as to conform with the applicable design and construction requirements of ANSI A92.2-1969. Aerial devices include the following types of vehicle-mounted aerial devices used to elevate personnel to jobsites above ground: (i) Extensible boom platforms, (ii) aerial ladders, (iii) articulating boom platforms, (iv) vertical tow-

ers, and (v) a combination of any of the above. Aerial equipment may be made of metal, wood, fiberglass reinforced plastic (FRP), or other material, may be powered or manually operated; and are deemed to be aerial lifts whether or not they are capable of rotating about a substantially vertical axis.

[1910.67(b)(1) amended by 61 FR 9235, March 7, 1996]

(2) Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section, and to be at least as safe as the equipment was before modification.

(3) The requirements of this section do not apply to firefighting equipment or to the vehicles upon which aerial devices are mounted, except with respect to the requirement that a vehicle be a stable support for the aerial device.

(4) For operations near overhead electric lines, see §1910.333(c)(3).

[1910.67(b)(4) revised by 58 FR 32014, August 6, 1993]

(c) *Specific requirements*—(1) *Ladder trucks and tower trucks*. Before the truck is moved, or highway travel, aerial ladders shall be secured in the lower traveling position by the locking device above the truck cab, and the manually operated device at the base of the ladder, or by other equally effective means (e.g., cradles which prevent rotation of the ladder in combination with positive acting linear actuators).

(2) *Extensible and articulating boom platforms*. (i) Lift controls shall be tested each day prior to use to determine that such controls are in safe working condition.

(ii) Only trained persons shall operate an aerial lift.

(iii) Belting off to an adjacent pole, structure, or equipment while working from an aerial lift shall not be permitted.

(iv) Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

(v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

[Sec. 1910.67(c)(2)(v)]



Reply to the Attention of: DCP/GICA/PAC

DEC 13 1999

Steven R. Semler, Esq.
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National Arborist Association
Suite 610
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Washington, D.C. 20015

DEC 14 1999

STEVEN R. SEMLER

Dear Mr. Semler:

Thank you for your August 25, 1999 letter to the Occupational Safety and Health Administration's (OSHA's) Directorate of Compliance Programs concerning fall protection in aerial lifts. Specifically, you requested an interpretation as to what type of fall protection is required for arborists working from aerial lifts. The interpretation provided in this letter supersedes and replaces all prior OSHA general industry interpretations on the subject matter.

Electric power generation, transmission and distribution work (§1910.269)

In all of its newer standards, OSHA has been requiring body harnesses, as opposed to body belts, for protection against falls because they provide far more effective protection from fall hazards. Accordingly, when OSHA developed its standard for electric power generation, transmission, and distribution, it adopted, through §1910.269(g)(2)(i), the specifications for personal fall arrest equipment set out in Subpart M of 29 CFR 1926, OSHA's standard for fall protection in construction. These specifications require the use of body harnesses rather than body belts and lanyards. When arborists are engaged in line clearance tree trimming work, they must adhere to these specifications.

An option would be the use of a restraint system. A restraint system prevents a worker from being exposed to any fall. If the employee is protected by a restraint system, either a body belt or a harness may be used. When a restraint system is used for fall protection from an aerial lift or a boom-type elevating work platform, the employer must ensure that the lanyard and anchor are arranged so that the employee is not potentially exposed to falling any distance.

Positioning Devices and Aerial Lift Work

The only time a body belt may be used where there may be a fall is when an employee is using a "positioning device." In Subpart M of the construction standards for fall protection, a "positioning device system" is defined as a body belt or body harness system rigged to allow an employee to be supported on an elevated vertical surface, such as a wall (or a pole), and work with both hands free while leaning. Therefore, in line clearance tree trimming work, a positioning device may be used only to protect a worker on a vertical work surface. These devices may permit a fall of up to 2 feet (0.6 m). Since line clearance tree trimmers in bucket trucks, scissor lifts, and boom-type elevating work platforms are on a horizontal surface, a positioning device may **not** be used for those workers.

Since January 1, 1998, several electric utilities have reported successful conversion to body harnesses in place of body belts for use in aerial lifts. The utilities' comments have stressed the importance of selecting a body harness that is comfortable and adjusting it properly to the specific employee. OSHA strongly encourages the use of body harnesses rather than body belts for fall protection.

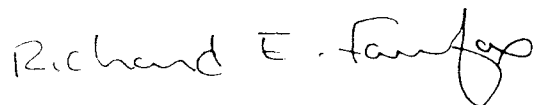
All other General Industry work

For all other General Industry work performed in an aerial lift, fall protection requirements are found in Part 1910.67, Vehicle Mounted Elevating and Rotating Work Platforms. Part 1910.67(c)(2)(v) states: "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." At a minimum, employers must comply with these requirements. Employers should be mindful, however, that body harnesses are generally superior to body belts in preventing injuries from falls. Accordingly, OSHA believes that conscientious employers should and will switch to the use of body harnesses.

We hope you find this information helpful. Please be aware that OSHA's enforcement guidance is subject to periodic review and clarification, amplification, or correction. Such guidance could also be affected by subsequent rulemaking. In the future, should you wish to verify that the guidance provided herein remains current, you may consult OSHA's website at <http://www.osha.gov>.

This letter will be disseminated to all of OSHA's Regional and Area offices. I thank you for your interest in Occupational Safety and Health and I look forward to implementation of our mutual goal of a safer and more healthful workplace for all arborists. If you have any further questions please contact the Office of General Industry Compliance Assistance at 202-693-1866.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Fairfax".

Richard E. Fairfax, Director
Directorate of Compliance Programs

NATIONAL
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Cynthia Mills
Executive Vice President
National Arborist Association
Amherst, NH 03031
(800) 733-2622

January 12, 2000 – FAX COPY

Mr. Richard E. Fairfax, Director
Directorate of Compliance Programs
U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Fairfax:

We respectfully request that OSHA immediately rescind its December 13, 1999 letter addressed to Steven Semler, the National Arborist Association's legal counsel, to forestall a planned judicial challenge by NAA to the letter's attempt to bypass the statutorily required notice and comment procedure required for changing an existing regulation.

After due consideration of your interpretation, in close consultation with Mr. Semler as well as the members of NAA's Board of Directors and Governmental Affairs Committee, we would like to outline the concerns we have with this interpretation.

1. Most substantively and centrally, the letter utterly fails to take any cognizance whatsoever – let alone reconcile – the fundamental basis for our inquiry – being the express meaning to be given to the §1910.269(g)(2)(v)(Note 1) provision that the requirements of the fall arrest paragraph do not apply to line clearance tree trimmer aerial lift work but instead are governed by the (body belt and lanyard) requirements of 29 CFR 1910.67 (see attached). The letter proceeds to ignore the existence of this "Note 1" exemption, as though it did not even exist in §1910.269, even though this "Note 1" regulation provision was the central basis of our inquiry. Respectfully, we simply do not understand how the response can ignore the regulation at issue, which drives the inquiry in the first place. This is especially so given that the letter contradicts this provision of the existing regulation. This is even more incongruous in that the letter contains, as an additional attachment thereto labeled "NAA's position" – an extensive legal analysis from NAA, the central tenet of which is that the "Note 1" exemption contained in §1910.269(g)(2)(v) bars, as a matter of law, the contrary assertion that body harness requirements are imposed in derogation of the plan prescription therein for body belts and lanyards. Not only does "Note 1" expressly make body belts applicable in lieu of harnesses; but OSHA has publicly so stated that body belts and lanyard continue to apply for line clearance tree trimming. See OSHA bulletin dated November 26, 1997 attached hereto.



2. The attachments provided with the letter add more confusion to the letter's meaning: Thus, the "GICA version" draft response attachment specifically confirms that body belts are permitted in such circumstances. Similarly, the "Crowley" version attachment expressly concludes that a body harness is not required. The rationale of the "Pipkin version" attachment simply cannot be discerned. In any event, tellingly, but again ignored in your letter's analysis, is the very Record of promulgation of Subpart M -- which you apparently assert served to eliminate the subject 1910.269 "Note 1": That Record, in turn, reflects that while 1910.269 specifically was amended to change the paragraph "(g)" incorporation of Subpart E, to the new Subpart M (see 59 Fed Reg. 40672), it did nothing to disturb continued vitality of the "Note 1" exception thereto contained in the same paragraph. Thus, this compellingly highlights that OSHA purposefully amended 1910.269, while at the same time purposefully continuing the effectiveness of the "Note 1" exception; hence that OSHA could have, but affirmatively chose not to, use the occasion to change "Note 1" when it otherwise amended the very same paragraph of 1910.269 in which "Note 1" appears. In these circumstances, OSHA's attempt to abrogate "Note 1" by letter of interpretation, when OSHA elected not to do so when otherwise amending the same paragraph of the regulation, forcefully demonstrates the facial lack of compliance with statutory requirements for modifying standards.

3. The letter appears to suggest a dichotomy which is inexplicably discriminatory-- allowing body belt and lanyards for arborists working from aerial lifts in non-line clearance tree work, but not for those doing the same tree work incident to power lines. This makes no sense to NAA, since §1910.67 applies body belts and lanyards to all aerial lift tree work, and §1910.269(g)(2)(v)(Note 1) specifically confirms that standard applies to line clearance tree work as well. Neither standard recognizes any basis for this discriminatory treatment.

4. Lastly, at an OSHA tree industry "stakeholders" meeting in Washington, D.C. on August 10-11, 1999, OSHA's representative David Wallis specifically announced that OSHA was planning to publish in the Federal Register a notice of revision of Part 1926 Subpart V and would include therein a proposed deletion of §1910.269(g)(2)(v)(Note 1) for line clearance tree trimming. Your letter thus seeks to accomplish through a letter of interpretation that which OSHA's representatives concede is properly planned to be subjected to the Notice and Comment process. This highlights your letter's apparent end run around statutory requirements expressly recognized by OSHA as being the applicable procedure to be followed.

In order to protect NAA members' rights, we are forced to assume the letter intends to "interpret" the imposition of a "body harness," rather than "body belt" requirement in the subject circumstances. If your letter therefore intends to state that arborists performing line clearance tree trimming in aerial lifts are required to use body harnesses instead of complying with "Note 1" provision for the §1910.67 (body belt and lanyard) requirements to apply to such work, then NAA believes, in that event, that the subject letter amounts to an illegal attempt to change the plain meaning of "Note 1" without "Notice and Comment" required by §6(b) of the OSHA statute and the Administrative Procedure Act, as to which NAA will file a judicial action to enjoin. For it is plain that a regulation cannot be so fundamentally changed without notice and opportunity for comment, under the guise of merely "interpreting" the regulation.¹ Moreover, Agency action must be reasoned.² We do not believe the subject letter complies with these requirements.

If we chose to file such action in the United States Court of Appeals under the OSHA statute, we statutorily have until February 12, 2000 to do so. Therefore, NAA respectfully requests that you advise us by January 28, 2000 of your decision to rescind the subject letter pending further review, or, alternatively, to definitively clarify it by then.

¹ National Mining Assn. v. MSHA, 116 F3d 520 (DC Cir. 1997); Paralyzed Veterans of America v. DC Arena, 117 F3d 579, 588 (DC Cir. 1997) (agency may not escape notice and comment obligations by attempting to impose new substantive obligations under guise of issuing interpretive rules of existing regulation).

² JSG Trading Corp. v. USDA, 176 F3d 536, 544-5 (DC Cir. 1999), applying APA and quoting Greater Boston Television Corp. v. FCC, 444 F2d. 841, 852 (DC Cir. 1970): "An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."

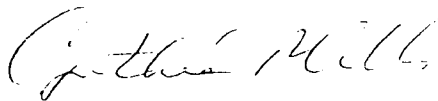
NAA does not wish to engage in litigation, because it is counterproductive to cooperating towards our mutual interest in promoting employee safety. Should OSHA wish to change the provisions of §1910.269, the statute provides an orderly process for doing so. If, as a result of that process, after opportunity for input from NAA and consideration of same by OSHA in an accountable fashion required by Congress, a revision is decided, NAA will of course comply. But NAA cannot permit the Agency, acting under the limited license to interpret its regulations, to swallow the process altogether by changing the meaning of the regulation by fiat.

We therefore respectfully urge OSHA to notify us by January 28, 2000, of its action on this request, failing which NAA will be forced to seek judicial recourse. All documents referred to herein are incorporated herein by reference.

NAA looks forward to hearing from you and to cooperating rather than litigating with OSHA.

Respectfully submitted:

NATIONAL ARBORIST ASSOCIATION



Cynthia Mills, CAE
Executive Vice President

cc: Charles N. Jeffress, Assistant Secretary of Labor for OSHA
R. Davis Layne, Deputy Assistant Secretary of Labor for OSHA
Henry Solano, Esq., Solicitor of Labor
Paul Cyr, Office of the Directorate of Compliance Programs, OSHA
Steven R. Semler, Semler & Pritzker, NAA Labor Counsel
Peter Gerstenberger, Director of Safety & Education, National Arborist Association
John R. Wright, President, National Arborist Association
The Honorable Michael B. Enzi, Chair, Employment, Safety, and Training Subcommittee of the Senate Health, Education, Labor and Pensions Committee
The Honorable Cass Ballenger, Chair, Subcommittee on Workforce Protections, House Education and the Workforce Committee

Reply to the Attention of:



Cynthia Mills, CAE
National Arborist Association
P.O. Box 1094
Amherst, NH 03031-1094

Dear Ms. Mills:

The Directorate of Compliance Programs is hereby withdrawing its December 13, 1999 letter to you concerning fall protection in aerial lifts. The letter was written in response to your August 25, 1999 letter requesting clarification of the Occupational Safety and Health Administration's position on this issue.

The Occupational Safety and Health Administration is currently reviewing its policy as to what type of fall protection is required for arborists working from aerial lifts. Accordingly, we have made the decision to withdraw the letter.

We regret any inconvenience this may have caused you. If you have further questions, please feel free to contact the Office of General Industry Compliance Assistance at 202-693-1850.

Sincerely,

Richard E. Fairfax

Richard E. Fairfax, Director
Directorate of Compliance Programs

RECEIVED

JAN 31 RECD

SENDER & PRINTER